No. 13-20-00287-CR

IN THE

COURT OF APPEALS FOR THE

TENTH SUPREME JUDICIAL DISTRICT

SITTING AT WACO, TEXAS

EX PARTE KRISEAN JAMON GIBSON,

APPELLANT

AN APPEAL OF A DENIAL OF AN
APPLICATION FOR WRIT OF HABEAS CORPUS
CAUSE NO. 2020-555-C1A
FROM THE 19TH DISTRICT COURT OF
MCLENNAN COUNTY, TEXAS

STATE'S BRIEF

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Issue Presented

Appellant's Issues Presented (restated):

1. Did the trial court abuse its discretion in denying Appellant's request to be released pursuant to Article 17.151.

Summary of Argument

Appellant's sole point of error is based on the argument that the indictment returned by the first grand jury was invalid because several members appeared virtually and that the second indictment was returned after 90 days had expired. Appellant's arguments are without merit. The grand jury that returned the initial indictment within 90 days consisted of a lawful quorum based on the orders of the Texas Supreme Court and the empaneling District Court. Nothing in the Texas or Federal Constitutions prohibit a grand juror from meeting virtually.

Even if the first indictment was invalid, the State was still ready within 90 days based on the return of that indictment. The State may be ready under Article 17.151 based on an invalid indictment as long as there was no bad faith on the part of the State. The State's reliance on the Texas

Supreme Court and the District Court's authorization for the grand jurors to meet remotely was in good faith.

Governor Abbott has also suspended the operation of Article 17.151 with regard to persons accused of violent offenses. Appellant is charged with murder and aggravated assault. Therefore, the Governor's Order prohibited Appellant's release.

Appellant's second indictment was returned within 120 days of detention. The deadline contained within Article 17.151 was lawfully modified by standing order of the District Courts of McLennan County. Therefore, the trial court's denial of Appellant's application was not an abuse of discretion.

Appellant was and is currently detained on "another allegation", namely, a motion to revoke probation. Appellant has not filed a motion for hearing within 20 days and therefore that constitutes another allegation in which the time has not expired under Article 17.151.

Argument

1) The trial court did not abuse its discretion in denying Appellant's Application for writ of habeas corpus

Appellant appeals the denial of his Application for Writ of Habeas Corpus seeking release under Code of Criminal Procedure Article 17.151. Although Appellant lists three issues presented, the complained of error is the denial of the Application and Appellant's issues are subpoints to the complained of error and therefore the State will address Appellant's stated issues in the only "question presented" which is whether the trial court abused its discretion in denying Appellant's Application.

LAW

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII; see also *Schilb v. Kuebel*, 404 U.S. 357, 365 (1971) (applying Eighth Amendment prohibition of excessive bail to the States). The standard for reviewing whether excessive bail has been set is whether the trial court abused its discretion. See *Ex parte Rubac*, 611 S.W.2d 848, 849–50 (Tex. Crim. App.

1981). A defendant carries the burden of proof to establish that bail is excessive. *Id.* at 849. In reviewing a trial court's ruling for an abuse of discretion, an appellate court will not intercede as long as the trial court's ruling is at least within the zone of reasonable disagreement. *Ex parte Beard*, 92 S.W.3d 566, 573 (Tex. App.—Austin 2002, pet. ref'd) (citing *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990)).

Appellate court's review a trial court's decision to deny relief on a claim that the trial court violated article 17.151 for an abuse of discretion. See *Ex parte Craft*, 301 S.W.3d 447, 448 (Tex. App.—Fort Worth 2009, no pet.) (mem. op. on reh'g). In reviewing the trial court's ruling, the evidence is viewed in the light most favorable to the ruling. See *id.* at 448–49.

ARGUMENT

The indictment returned by the grand jury on May 6th is valid

On May 6, 2020 an indictment was returned by a McLennan County Grand Jury. 3 RR 8. Appellant was re-indicted on May 26, 2020. 3 RR 9. Appellant's argument first rests on the faulty assertion that the Texas

Supreme Court's Twelfth Order is unconstitutional and therefore the indictment is void.

The Appellant first attacks the Supreme Court's order on the grounds that the order suspends the requirement of a quorum of a grand jury to return an indictment. This assertion is simply incorrect. Nothing in the language of the order suspends the requirement of a quorum of a grand jury. The order only allows for a modification from the preferred procedure of a face to face meeting of the grand jury by allowing grand jurors to appear through videoconferencing. See *Twelfth Emergency Order Regarding COVID-19 State of Disaster*, 20-9059, 2020 WL 6390519, at *1 (Tex. Apr. 27, 2020).

On May 26, 2020, the Supreme Court issued its Seventeenth Emergency Order, which not only included the identical language contained in the Twelfth Order that added grand juror to those that may appear remotely, it added an entire paragraph specific to grand juries that states that they "may meet either remotely or in-person." *Seventeenth Emergency Order Regarding COVID-19 State of Disaster*, 20-9071, 2020 WL

6390650, at *1 (Tex. May 26, 2020). The Supreme Court's continued inclusion of remote meetings by the grand jury in their own order is indicative as to their opinion as to the constitutionality of the ability of a grand juror to appear remotely.

First, nothing in the plain language of the Texas Constitution requires a grand juror to be physically present. Procedures have been evolving with technology for many years. The United States Supreme Court has held in the confrontation clause setting that "Although face-to-face confrontation forms 'the core of the values furthered by the Confrontation Clause, we have nevertheless recognized that it is not the sine qua non of the confrontation right.'" *Maryland v. Craig*, 497 U.S. 836, 847 (1990) (internal citations omitted). In *Craig*, the Supreme Court recognized that the use of technology for remote appearances satisfies the right of a defendant to face their accuser. The same rationale should be applied to the appears of a grand juror by remote technology.

Appellant also argues that the grand jury belongs to no branch of the government and therefore, is not a court proceeding. Appellant relies a

civil case that was reviewing a malicious prosecution claim regarding the return of an indictment that was returned by a **Federal Grand Jury.** App. Br. at 12 citing *Gunville v. Gonzales*, 508 S.W.3d 547, 563 (Tex. App.—El Paso 2016, no pet.). Reliance on a civil interpretation of the role of a federal grand jury is misplaced. Regarding a State of Texas Grand Jury, the Second Commission on Appeals held almost 100 years ago that, "That the grand jury is an arm of the court, and a part of the judicial system for the administration of the criminal law, is not open to question." *Hott v. Yarbrough*, 112 Tex. 179, 185 (Comm'n App. 1922). While the grand jury is clothed with great independence in many areas, it is also connected to the court that impaneled it. See *Ex parte Edone*, 740 S.W.2d 446, 448 (Tex. Crim. App. 1987). The court exercises supervisory power over the grand jury, whether by impaneling, reassembling, qualifying, quashing subpoenas, or aiding investigations. See *id.* Moreover, the grand jury must look to the impaneling judge to enforce its subpoena power. See *Ex parte Wynne*, 772 S.W.2d 132, 135 (Tex. Crim. App. 1989). In this context, the grand jury is often characterized as an arm of the court by which it is appointed rather

than an autonomous entity. *Ex parte Edone*, 740 S.W.2d at 448 (citing Wayne LaFave & Jerold Israel, Criminal Procedure, § 8.4, at 625 (1984)). Because the grand jury is an arm of the court grand jury proceedings are "court proceedings" as contemplated by Section 22.0035 of the Texas Government Code. Appellant's reliance on federal law that a grand jury does not belong to any branch of government is analyzing a federal grand jury and not a state grand jury and is therefore inapplicable to this issue.

Appellant further argues that the twelfth order allows unauthorized persons into the grand jury for deliberations. This claim is based on nothing more than speculation. There is nothing that indicates anyone other than the grand jurors participated in deliberations in deciding to indict the Appellant. The mere fact that it is possible for someone to be present is not any evidentiary proof that someone was actually present. Since there is no evidence that anyone other than the grand jurors were present in this case Appellant's argument must fail.

The Supreme Court's continued authorization of a grand juror meeting remotely constitutes a valid order under the authority granted to

the Supreme Court by the legislature to modify court proceedings. Therefore, the indictment returned on May 6, 2020 is valid.

Article 17.151 has been suspended by executive order of Governor Abbott

Appellant has not challenged Governor Abbott's order, EO-GA-13, that suspended the operation of Article 17.151's automatic release provision. However, the State in an effort to be thorough will discuss the validity of the order.

Under Chapter 418, also known as the Texas Disaster Act of 1975, the Governor is tasked with "meeting... the dangers to the state and people presented by disasters." Tex. Gov't Code Ann. § 418.011. The Legislature decided that, in times of crisis, the Governor should have broad powers to fulfill that weighty responsibility, including:

- Using all available resources of state government and political subdivisions, Tex. Gov't Code Ann. § 418.017(a);
- Controlling ingress to and egress from, and the movement of persons and occupancy of premises within, a disaster area, Tex. Gov't Code Ann. § 418.018(c);

- Issuing executive orders and proclamations carrying the force and effect of law, Tex. Gov't Code Ann. § 418.012; and
- "[S]uspend[ing] the provisions of any regulatory statute prescribing the procedures for conduct of state business or the orders or rules of a state agency if strict compliance with the provisions, orders, or rules would in any way prevent, hinder, or delay necessary action in coping with a disaster," Tex. Gov't Code Ann. § 418.016(a).

Because Chapter 418 does not define "regulatory statute," the Court should look to the ordinary meaning of that term. See, e.g., *City of Richardson v. Oncor Elec. Delivery Co. LLC*, 539 S.W.3d 252, 261 (Tex. 2018). Webster's Dictionary defines "regulatory" to mean "of or relating to regulation: making or concerned with the making of regulations: regulative (measures) (a local body)." Regulatory, Webster's Third New Int'l Dictionary (2002). Webster's definition of "regulation" includes: "2a: an authoritative rule or principle dealing with details of procedure; esp: one intended to promote safety and efficiency." Regulation, Webster's Third New Int'l Dictionary (2002). In short, under the ordinary meaning of

"regulatory," a regulatory statute is just a statute that provides controlling rules or governing principles in some area. The suspended provisions in the Code of Criminal Procedure easily fit that definition.

Indeed, the Texas Supreme Court has used the term "regulatory statute" in a way that is fully consistent with that plain-meaning interpretation. In *Philadelphia Indem. Ins. Co. v. White*, 490 S.W.3d 468 (Tex. 2016), the Court discussed a "public policy expressed in a regulatory statute," *id.* at 490, in reference to the legislative determination - expressed in sections 92.052 and 92.053 of the Texas Property Code - that tenants should bear the burden of proving "that damage to premises under the tenant's control was caused by the tenant," *id.* at 487. Yet no state agency administers or is governed by those Property Code provisions, nor do they "relate to the regulatory authority of the Executive."

Section 418.0155 requires the Governor to compile a "list of regulatory statutes and rules that may require suspension during a disaster," Tex. Gov't Code Ann. § 418.0155(a), and contemplates that "a state agency that would be impacted by the suspension of a statute or rule

on the list" may advise the Governor regarding the potential addition of statutes to the list, Tex. Gov't Code Ann. § 418.0155(b). But state agencies obviously may be impacted by the suspension of numerous statutes other than those that govern them. And nothing in section 418.0155 or any other provision in Chapter 418 purports to limit "regulatory statutes" to statutes that govern state agencies. Nor does the Administrative Procedure Act's definition of "state agency" affect the meaning of "regulatory statute" in Chapter 418.

Additionally, the statutory provisions suspended by EO-GA-13 prescribe the procedures for conduct of state business. Those provisions undisputedly establish procedures and standards for pretrial release on personal bond or the release of convicted offenders. And determining when jailed or incarcerated persons may safely be released is a quintessential governmental function, i.e., state business. The fact that the Legislature gave the Governor broad power to suspend regulatory statutes that would impede disaster-recovery efforts does not mean that it gave him "unlimited authority" to suspend provisions of the Code of Criminal

Procedure in any disaster scenario. Instead, the Legislature cabined the Governor's suspension power by, among other things, limiting it to statutes the strict compliance with which would "prevent, hinder, or delay necessary action in coping with a disaster." Tex. Gov't Code Ann. § 418.016(a). Further, the suspension power is temporally restricted by the 30-day default limit for declared states of disaster, together with the Legislature's ability to "terminate a state of disaster at any time." Tex. Gov't Code Ann. § 418.014(c). Those provisions help ensure that the gubernatorial suspension power is not used in a manner inconsistent with legislative design.

Additionally, the Governor's order prohibited the release of any individual on a personal bond who is charged with a violent offense. Appellant is charged with Aggravated Assault. Therefore, the Governor's order would prohibit the release of the Appellant on a personal bond.

Appellant is also arrested on an offense of Aggravated Assault- Deadly Weapon. Therefore, Appellant is not entitled to be released because Appellant is charged with an offense involving violence and therefore

Governor Abbott's EO-GA-13 expressly prohibits his release.

The 90 day deadline has been extended by lawful order of the Trial Court

On March 23, 2020, the Honorable Judges of the 19th and 54th District Court entered a standing order modifying the period from "90 days" to "120 days" for purposes of Article 17.151. The Courts had the authority to enter such an order. The Appellant has not challenged that Court's order in the application. However, in an effort to be thorough the State will address the validity of that order.

The Legislature has accorded the Texas Supreme Court and the Texas Court of Criminal Appeals the authority to "modify or suspend procedures for the conduct of any court proceedings affected by a disaster during the pendency of a disaster declared by the governor." Tex. Gov't Code Ann. § 22.0035(b).

In 2009, when Section 22.0035 was enacted, the Chair of the House Judiciary and Civil Jurisprudence Committee explained the legislative intent behind the provision:

What this does is [H.B.] 1861 establishes that the Supreme Court

> and the Texas Court of Criminal Appeals have full rulemaking power to extend a statutory deadline for not more than 30 days in a county in which a disaster has occurred. If you remember, like they had in Louisiana and some of the Gulf Coast states as well, is I thought we were very prepared in Texas but it's in the situation you want to give them that flexibility for any cases that are pending at that time. And it's basically a practical bill and lays out some pretty good practical sense.

House Judiciary & Civil Juris. Comm., H.B. 1861, Apr. 6, 2009 (archived at http://tlchouse.granicus.com/MediaPlayer.php?view_id=25&clip_id=3728 at 1:26:10) (last visited May 27, 2020).

Release Pursuant to Article 17.151 Is Not a Constitutional Right

In 1977, the Legislature enacted Article 17.151 as part of the Speedy Trial Act, which also gave rise to Article 32A.02, Code of Criminal Procedure. Article 32A.02 was later ruled unconstitutional as an infringement of the separation of powers doctrine. *Meshell v. State*, 739 S.W.2d 246, 257 (Tex. Crim. App. 1987). By contrast, Article 17.151 was spared the same separation of powers invalidation because it "does not interfere unduly with the prosecutor's function." *Jones v. State*, 803 S.W.2d 712, 716 (Tex. Crim. App. 1991).

In upholding Article 17.151, the *Jones* Court expressly pointed out

that the statute was not premised on a constitutional right to release on bail:

> We do not mean to suggest an accused has a constitutional right to have bail set at an amount he can meet, under Article I, §§ 11 or 13 of the Texas Constitution. This Court has never so held, and in fact on numerous occasions has remarked that in setting bail, "[t]he ability of accused to make bond is not alone controlling."

Id. (quoting *Ex parte Cascio*, 140 Tex. Crim. 288 (1940)). Instead, the Court summarized the intention of the statute as "guarantee[ing] an accused will not be detained pretrial for an inordinate length on account of a lack of diligence by the State in preparing its case." *Id.* at 717.

The State has found no authority from any court following the *Jones* decision that has ever characterized Article 17.151 as being of constitutional dimension. Accordingly, whatever rights may be found in Article 17.151 are purely statutory; as such, those rights may be abridged by the same Legislature that created them.

Emergency Orders Issued Pursuant to Section 22.0035 Do Not Violate Article I, Section 28 of the Texas Constitution

Because Article I, Section 28 of the Texas Constitution provides that "[n]o power of suspending laws in this State shall be exercised except by the Legislature," Tex. Const. art. I, § 28, it is important, as a threshold matter, to establish that the *First Emergency Order* and an exercise of authority pursuant to that order—specifically, the modification of Article 17.151's 90-day deadline—are compatible with this constitutional provision.

Although the *First Emergency Order* authorizes the "suspen[sion]" of "deadlines and procedures," the trial court's order does not *suspended* Article 17.151 but, rather, only *modifies* the statute's 90-day deadline, in deference to the extraordinary circumstances of the present disaster. The words *suspension* and *modification* are not synonymous: the Constitution's purposeful use of the narrow word "suspending" in Article I, Section 28 appears to have been intended to prevent the usurpation of power by the Governor. *See generally* Practice Commentary, Tex. Const. art. I, § 28 ("Such a provision was written into the fundamental law mainly as direct inhibition upon the executive, the thought being that the people's

representatives who are empowered to enact the law should be the only body empowered to suspend those laws."); *Constantin v. Smith*, 57 F.2d 227, 237 (E.D. Tex. 1932) (explaining that the provisions of the 1876 Constitution, including Tex. Const. art. I, § 28, were "written into the fundamental law as direct inhibitions upon the executive, by men who had suffered under the imposition of martial law, with its suspension of civil authority, and the ousting of the courts during reconstruction in Texas").

Unlike the suspension of existing law and imposition of martial law, this is not an instance in which the judiciary is being called upon to suspend a law without legislative permission. Instead, this Court's modification of Article 17.151's 90-day deadline would be an extension of the Texas Supreme Court and Texas Court of Criminal Appeals' authority—extant only under extraordinary circumstances, and pursuant to a law promulgated by the Legislature itself—to administer a legislative grant of authority, *viz.*, to "modify or suspend *procedures* for the conduct of *any* court proceeding affected by a disaster during the pendency of a disaster declared by the governor." Tex. Gov't Code Ann. § 22.0035(b)

(emphasis added). The *First Emergency Order* expressly relies on this provision; moreover, the emergency order tracks the language of Section 22.0035(b). *Compare id., with First Emergency Order Regarding COVID-19 State of Disaster, 596 S.W.3d 265 (Tex. 2020)* (requiring that "all courts in Texas" "[m]odify or suspend any and all deadlines and procedures, whether prescribed by statute, rule, or order," "to avoid risk to court staff, parties, attorneys, jurors, and the public"). And in further adherence to Section 22.0035(b), the *First Emergency Order* limits any modification to "a stated period ending no later than 30 days after the Governor's state of disaster has been lifted." *Id.* at 256.

The Legislature specifically limited the length of time in which procedural modifications could occur, but it authorized those modifications as expressions of its authority, not a delegation of it. Section 22.0035(b) is an act of the Legislature that permits the Texas Supreme Court to administer the disaster provision, not circumvent legislative authority. *See generally* Practice Commentary, TEX. CONST. art. I, § 28 (2007) ("For example, if an executive agency or a local government should take action in

the suspension of a law, *independently of any delegation by the Legislature*, that action could be nullified under this provision without a consideration of the question of legislative declaration of power.").

The Legislature has properly utilized its authority without violating Article I, Section 28 of the Texas Constitution in the past, such as when it permitted the Texas Supreme Court and Texas Court of Criminal Appeals to create rules of evidence and procedure for civil and criminal cases. *See* Tex. Gov't Code Ann. § 22.004 (providing the Texas Supreme Court with rulemaking power in the practice and procedure in civil actions), 22.108 (granting the Texas Court of Criminal Appeals rulemaking power to promulgate rules for appellate procedure), 22.109 (authorizing the Texas Court of Criminal Appeals the full rulemaking power in the promulgation of rules of evidence in the trials of criminal cases). It likewise properly utilized its authority when, in 2017, the criminal justice systems in numerous Texas counties were significantly disrupted due to Hurricane Harvey and, because of those disruptions, the Texas Supreme Court and Texas Court of Criminal Appeals issued emergency orders not unlike the

present one. *See, e.g.*, *Emergency Order Authorizing Modification and Suspension of Court Procedures in Proceedings Affected by Disaster*, Misc. Docket No. 17–9091 (Tex. Aug. 28, 2017), Misc. Docket No. 17–010 (Tex. Crim. App. Aug. 28, 2017).

The Court of Criminal Appeals reached a similar conclusion in a challenge to a legislative delegation of authority in *Masquelette v. State*. In *Masquelette*, the Court held that, "[s]o long as the statute is sufficiently complete to accomplish the regulation of the particular matters falling within the Legislature's jurisdiction, the matters of detail that are reasonably necessary for the ultimate application, operation and enforcement of the law may be expressly delegated to the authority charged with the administration of the statute." 579 S.W.2d 478, 480 (Tex. Crim. App. [panel op.] 1979 (citing *Commissioners Court of Lubbock County v. Martin*, 471 S.W.2d 100 (Tex. Civ. App.—Amarillo 1971, writ ref'd n.r.e.))). In the instant case, the Legislature permitted the Texas Supreme Court the authority to administer the "Modification or Suspension of Certain Provisions Relating to Court Proceedings Affected by Disaster" through

the modification of statutory procedures, and, in turn, the Texas Supreme Court has permitted the trial court the authority to modify Article 17.151's 90-day deadline.

This is further evidenced by the Section 22.0035 language. The Legislature defined the term *disaster* by statute. *See* Tex. Gov't Code Ann. § 22.0035(a) (cross-referencing Section 418.004's definition of *disaster*). It further required that the Governor declare that a disaster does, in fact, exist, and it limited the duration of a modification or suspension order to "the pendency of [the] disaster." Tex. Gov't Code Ann. § 22.0035(b).

The grant of authority to modify certain provisions for a disaster does not differ from the Texas Supreme Court and the Texas Court of Criminal Appeals' ability to promulgate rules and procedures. It is also important to note that the Court's *First Emergency Order* did not suspend the rules. Rather, it authorized the modification of deadlines for the period in which the COVID-19 state of disaster is pending. *See also Interest of C. M. J.*, 573 S.W.3d 404, 407–09 (Tex. App.—Houston [1st Dist.] 2019, pet. denied) (approving a district court's delay in a mandatory statutory deadline to

finalize a parental-termination order because that delay was supported by a valid exercise of the Texas Supreme Court's authority under Section 22.0035(b) following the Hurricane Harvey disaster); *Interest of M.T.R.*, 579 S.W.3d 548, 566 (Tex. App.—Houston [14th Dist.] 2019, pet. denied) (recognizing that the emergency order issued by the Texas Supreme Court in response to Hurricane Harvey allowed the trial court to extend the dismissal date of the suit). Additionally, the Court of Criminal Appeals has recognized that mandatory statutory deadlines, even in the context of habeas, can be extended pursuant to the Emergency Orders of the Court. See *In re Hancock*, WR-31,789-04, 2020 WL 2049111 (Tex. Crim. App. Apr. 29, 2020) (recognizing that the first joint emergency orders of the Supreme Court and the Court of Criminal Appeals authorized an order establishing new deadlines in accordance with the emergency order would extend the mandatory period under Article 11.07); See also *In re Henderson*, WR-56,883-25, 2020 WL 2049112 (Tex. Crim. App. Apr. 29, 2020) (Same).

In view of the foregoing, the *First Emergency Order* is not unconstitutional and therefore this Court's March 23, 2020 standing order

properly modified the deadline under Article 17.151 to 120 days. Appellant was re-indicted on May 26, 2020, which was approximately 95 days after the initial detention. Additionally, it was only 112 days between the date of detention and the date of the scheduled hearing of June 12, 2020. Therefore, Appellant is not entitled to release because the modified period under Article 17.151 has not expired.

State was ready within the 90 days

Appellant's argument also is premised on the assumption that the return of a valid indictment is an essential element of the State's readiness for trial. However, where there is no showing of bad faith, "the State may be prepared for trial even though the indictment that forms the basis for the prosecution of the offense is so defective as to be void." *Ex parte Brosky*, 863 S.W.3d 775, 778 (Tex. App.—Fort Worth, 1993) citing *Behrend v. State*, 729 S.W.2d 717, 720 (Tex. Crim. App. 1987). Additionally, the Court of Criminal Appeals has held that a valid information or indictment is not absolutely essential in order to show the State's readiness for trial. *Ward v. State*, 659 S.W.2d 643, 646 (Tex. Crim. App. 1983). The *Ward* Court held that

the distinction between an announcement of ready on no indictment or information and an announcement of ready on a defective indictment or information to be of paramount significance. *Id.* Although *Ward* and *Behrend* were an analysis under the speedy trial act, the same analysis of what constitutes readiness on the part of the State is used under Article 17.151. Appellant continues to incorrectly state that "*Brosky* is a speedy trial case, not a 17.151 case." App. Br. at 32. This argument is incorrect as the decision states: "sole point of error, Brosky complains the trial court erroneously refused to set bond in an amount he could afford or to set a personal bond, because the State was not ready for trial within 90 days from the commencement of his detention. See Tex. Code Crim. Proc. Ann. art. 17.151 (Vernon Supp.1993)." *Ex parte Brosky*, 863 S.W.2d at 777.

Additionally, the Tenth Court of Appeals has recently cited to *Ex parte Brosky* and *Brehend* in determining the question of the State's "readiness" within the statutory limits under Article 17.151. See *Ex parte Garner*, 10-19-00120-CR, 2019 WL 4072067 (Tex. App.—Waco Aug. 28, 2019, no pet.) (not designated for publication); *Ex parte Jenkins*, 10-13-00030-CR,

2013 WL 2128314 (Tex. App.—Waco May 16, 2013, pet. ref'd) (not designated for publication).

There is no showing of bad faith in this case. The State's reliance on the Twelfth Emergency of the Texas Supreme Court that authorized a grand juror to attend through videoconferencing is a valid, and reasonable basis for the State's reliance, regardless of the disposition of the Appellant's claim as to the validity of the indictment. The State's reliance on an order by one of the two highest court's in the State would lead to the rational conclusion that the State was acting in good faith. Additionally, the trial court also authorized the grand juror's appearing through video conferencing. Therefore, the State's reliance on the impaneling Court's authorization is an additional factor showing lack of bad faith. Therefore, the State was ready as defined by Article 17.151 within the original 90 day period.

Appellant is currently detained on another allegation for which the deadline has not expired

Appellant is detained on a pending Motion to Revoke Probation in Cause number 2017-954-C1 for the offense of Aggravated Robbery. The

deadline regarding a hearing (trial) on the motion to revoke is 20 days from the date the Appellant files a motion to hold the hearing. See Tex. Code Crim. Pro. Ann. art. 42A.751(d). The issue of a pending motion to revoke constituting an exception under Article 17.151 was addressed by the Austin Court of Appeals in *Ex parte De Paz*, 03-15-00581-CR, 2016 WL 3765751 (Tex. App.—Austin July 7, 2016, no pet.) (not designated for publication). The Austin Court of Appeals held that the hold from Hays County for the pending motion to revoke constituted another allegation under Article 17.151 and because the Appellant had not filed a motion for a hearing under (formerly) Article 42.12 Section 21 the 20 day deadline had not expired at the time of the hearing on the writ and therefore the trial court properly denied the writ. Id. at 3. Since the Appellant in this case has not filed a motion under Code of Criminal Procedure Article 42A.751(d) and 20 days could not have passed since no motion has been filed he is not entitled to release under Article 17.151.

Prayer

For the foregoing reasons, the State of Texas prays that this Honorable Court affirm the denial of the Application for Writ of Habeas Corpus of and prays for such other and further relief as may be provided by law.

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